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No. 80-

IN THE SUPREME COURT OF THE
UNITED STATES

October Term, 1980

PEOPLE OF THE STATE OF CALIFORNIA,

Petitioner,

v.

RANDALL JAMES PRYSOCK,

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF APPEAL OF THE
STATE OF CALIFORNIA,
FIFTH APPELLATE DISTRICT

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QUESTION PRESENTED

Should respondent's voluntary confession be suppressed because he was advised of his constitutional rights in language which conveyed all essential information but was not phrased in precisely the same manner as the standard language of Miranda v. Arizona (1966) 384 U.S. 436?

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OPINION BELOW

The Opinion of the California Court of Appeal, Fifth Appellate District, an unpublished 1980 decision numbered 5 Crim. 4051, appears as Appendix "A" to this Petition.

JURISDICTION

The petitioner, the People of the State of California, respectfully prays that a writ of certiorari issue to review the judgment of the California Court of Appeal, Fifth Appellate District, which was entered in this proceeding on December 5, 1980. The Court of Appeal denied petitioner permission to file petition for rehearing on January 2, 1981 (Appendix "B"), and that same day denied respondent's petition for rehearing (Appendix "C"). The decision became final as to that court on January 4, 1981. (Rules 24(a) and 28, California Rules of Court.) The California Supreme Court denied the People's and Respondent's petitions for hearing on March 5, 1981 (Appendix "D"). The remittitur issued on March 6, 1981.

This Court's jurisdiction is

invoked under 28 U.S.C. section 1257(3).

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Amendment V:

> "No person . . . shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law; . . ."

United States Constitution, Amendment XIV:

> ". . .nor shall any state deprive any person of life, liberty, or property, without due process of law; . . ."

STATEMENT OF THE CASE

A. Proceedings in the State Court

Respondent Prysock was convicted by jury in the Superior Court of the State of California, in and for the County of Tulare of crimes in six counts: first degree murder with two special circumstances (torture and robbery), robbery, burglary, auto theft,

destruction of evidence and escape from juvenile camp. (CT 52a-53a, 179a-190a, 230a.) Upon conviction, the Superior Court committed respondent Prysock to life imprisonment without the possibility of parole. (CT 231a.)

The Court of Appeal of the State of California, Fifth Appellate District, by unpublished decision filed December 5, 1980, reversed respondent's judgment of conviction on all counts other than escape. The State Court held that respondent was not properly advised of his right to the services of a free attorney before and during the interrogation. (Appendix "A".)

The People of the State of California petitioned for rehearing on December 29, 1980, but permission for petitioner to file a petition for rehearing was denied on January 2, 1981. (Appendix "B".) Respondent's

petition for rehearing was denied on January 2, 1981. (Appendix "C".)

The petition for hearing was timely filed in the California Supreme Court on January 13, 1981, and denied on March 5, 1981. (Justices Mosk and Richardson voted to grant a hearing.) (Appendix "D".)

B. Statement of the Facts

On January 30, 1978, Mrs. Donna Iris Erickson was brutally murdered. She was struck with a wooden dowel, bludgeoned with a fireplace poker, stabbed with an ice pick and finally strangled with a telephone cord. (RT 73-74, 76-78, 752, 755-757.)

On the evening of that day, respondent and his co-defendant were apprehended for commission of the offense. They were brought to a substation of the Tulare County Sheriff's Department. Upon arrival,

respondent Prysock was advised of his Miranda rights by Sergeant Robert Byrd. Respondent at this time invoked his right to remain silent. (RT 226-228, 332-333.)

Thereafter, because respondent was a minor, officers contacted respondent's parents. The elder Prysocks arrived at the substation, where Mrs. Prysock asked to speak to her son. She and respondent spoke privately in a small room for 15 to 20 minutes. Mrs. Prysock then emerged and announced to deputies that her son was ready to speak to them. (RT 233-234, 245.)

Sergeant Byrd set up a tape recorder in the room. On tape, Byrd asked respondent whether he wished to speak to officers. When respondent answered in the affirmative, Byrd carefully explained to respondent his constitutional rights.

(RT 234-235.) The portion of the warnings regarding right to counsel was transcribed from the tape recordings as follows:

> "Sgt. Byrd: You have the right to talk to a lawyer before you are questioned, have him present with you while you are being questioned, and all during the questioning. Do you understand this?
>
> "Randall P.: Yes.
>
> "Sgt. Byrd: You also, being a juvenile, you have the right to have your parents present, which they are. Do you understand this?
>
> "Randall P.: Yes.
>
> "Sgt. Byrd: Even if they weren't here, you'd have this right. Do you understand this?
>
> "Randall P.: Yes.
>
> "Sgt. Byrd: You all, uh, -- if, -- you have the right to have a lawyer appointed to represent you at no cost to yourself. Do you understand this?
>
> "Randall P.: Yes.

"Sgt. Byrd: Now, having all these legal rights im mind, do you wish to talk to me at this time?

"Randall P.: Yes. . . ."
(Appendix "A", pp. ii-iii; RT 237.)

Respondent's parents and Sergeant Byrd then had an off-tape conversation concerning legal representation. Mrs. Prysock asked the Sergeant whether respondent could still have an attorney at a later date. Sergeant Byrd replied that respondent could have an attorney when he went to court, that he could have an attorney at this time if he wished one, and that respondent could terminate his statement at any time he desired. At the conclusion of this conversation, respondent and his parents again stated that they would like to proceed without counsel. Respondent then

gave a statement to the Sergeant regarding his involvement with Mrs. Erickson's murder. (RT 237-238, 422-423.)

It should be noted that respondent, a youth camp escapee at the time, had been represented by a Public Defender in his previous case. (RT 288.)

At trial, the Superior Court denied respondent's motion to suppress evidence of the taped statement. (RT 221, 350-351.)

ARGUMENT

RESPONDENT WAS PROPERLY ADVISED OF HIS CONSTITUTIONAL RIGHTS IN LANGUAGE WHICH CONVEYED ALL ESSENTIAL INFORMATION, AND HIS CONFESSION IS ADMISSIBLE

On the basis of this Court's opinion in Miranda v. Arizona (1966) 384 U.S. 436, 88 S.Ct. 1602, 16 L.Ed.2d 694, the California Court of Appeal has erroneously concluded that respondent was not adequately warned of his right to the services of a free attorney before and during interrogation.

The Court of Appeal's misinterpretation of Miranda involves substantial questions of a recurring nature involving the Fifth and Fourteenth Amendments, and application of Miranda by lower courts.

This Court has never required that Miranda warnings, in order to be effective, must be phrased in the precise language employed in the Miranda opinion. Rather, this Court has made it clear that effective

Miranda warnings need only convey the substance of the required warnings in intelligible language. In the Miranda opinion itself, this Court introduced the newly-required warnings by saying:

> "The warnings required and the waiver necessary in accordance with our opinion today are, in the absence of a fully effective equivalent, prerequisites to the admissibility of any statement made by a defendant." (384 U.S. at p. 476.) (Emphasis added.)

Later in the opinion, this Court again stated:

> "Procedural safeguards must be employed to protect the privilege [against self-incrimination] and unless other fully effective means are adopted to notify the person of his right of silence, and to assure that the exercise of the right will be scrupulously honored, the following measures are required. . . ." (384 U.S. at p. 479.) (Emphasis added.)

Last year, this Court reiterated that the proper emphasis is upon substance rather than form. In Rhode Island v. Innis (1980) 446 U.S. 291, 297, 100 S.Ct. 1682,

64 L.Ed.2d 297, this Court reemphasized that Miranda mandated "the now-familiar Miranda warnings . . . or their equivalent." (Emphasis added.)

In accordance with this Court's directives, federal courts have rejected rigid formalism in interpreting Miranda. It is well established in these courts that Miranda does not prescribe an exact, undeviating format which must be recited when advising a suspect of his or her constitutional rights. (See, e.g., Coyote v. United States (10th Cir. 1967) 380 F.2d 305, 308, cert. den. 404 U.S. 864, 92 S.Ct. 44, 30 L.Ed. 2d 107, "Surely Miranda is not a ritual of words to be recited by rote according to didactic niceties. What Miranda does require is meaningful advice to the unlettered and unlearned in language which he can comprehend and on which he can knowingly act. We will not indulge in semantical debates between

counsel over the particular words used to inform an individual of his rights"; United States v. Vanterpool (2d Cir. 1968) 394 F.2d 697, 698-699, ". . . the words of Miranda do not constitute a ritualistic formula which must be repeated without variation in order to be effective. Words which convey the substance of the warning along with the required information are sufficient"; Camacho v. United States (9th Cir. 1969) 407 F.2d 39, 42, n. 2, cert. den. 396 U.S. 944, 90 S.Ct. 380, 24 L.Ed.2d 245, "The precise words or nicety of language used in advising a suspect of his rights are not determinative; substance controls form"; Tucker v. United States (8th Cir. 1967) 375 F.2d 363, cert. den. 389 U.S. 888, 88 S.Ct. 128, 19 L.Ed.2d 189, " . . . the Supreme Court did not prescribe an exact format or postulate the precise language that must be used in advising a subject of his

constitutional right to remain silent. Courts must, of course, zealously guard against an invasion of that right. In resolving the question in light of the Miranda standards, the substance and not the form of the warnings should be of primary importance.")

Miranda requires that, prior to custodial interrogation, a defendant be warned, " . . . that he has the right to the presence of an attorney, and that if he cannot afford an attorney, one will be appointed for him prior to any questioning if he so desires." (384 U.S. at p. 436.)

In the instant case, the totality of relevant facts and circumstances show that the police admirably discharged their duty to advise respondent of his constitutional rights, and that respondent fully understood and waived those rights. (See Fare v. Michael C. (1979) 442 U.S. 707, 725-726,

99 S.Ct. 2560, 61 L.Ed.2d 197.) Respondent was given Miranda warnings on two separate occasions on the night of his arrest. When respondent was first brought to the sheriff's station, Sergeant Byrd informed him of unspecified "Miranda" rights. Respondent invoked his right to remain silent, demonstrating his understanding of the warning.

Respondent was again warned of his Miranda rights by Sergeant Byrd after respondent's mother approached the sergeant and told him that her son wished to speak. The sergeant painstakingly explained respondent's rights to him in a taped conversation. From the advisements then given, respondent clearly knew he had the right to have an attorney present before and during any questioning and to have an attorney appointed to "represent" him free of charge. "Representation" of respondent in the case could clearly encompass an attorney's presence

during questioning. There is no reason to suppose appellant believed it referred to the right to an attorney at some later time. These warnings fully complied with Miranda, even though they were not given in the precise sequence set forth in that opinion. Only a hypertechnical view of Miranda would invalidate such advisements.

Moreover, after respondent waived his rights and before any statement was taken, the sergeant also answered respondent's parents' questions about legal representation at a future time. The sergeant informed respondent's parents that respondent could have legal counsel at trial, during interrogation if he so desired, and that the questioning would stop if and when respondent requested. Respondent then reiterated his desire to have counsel and the right to remain silent. Importantly, respondent, who was a Youth Camp escapee at

the time of his arrest, had been previously represented by a Public Defender, an attorney provided free of charge in California.

The record on appeal therefore discloses that the warnings given respondent more than adequately comply with the essential requirement that a defendant receive meaningful advice "in language which he can comprehend and on which he can knowingly act." (Coyote v. United States, supra, 38 F.2d 305, 308.)

A number of circuit courts have ruled upon warnings similar to the ones given in the instant case, and upheld them as adequate under Miranda.

In Coyote v. United States, supra, 380 F.2d 305, the defendant was advised, with regard to assistance of counsel, that before making any statement he could consult a lawyer of his own choice, and in the event he was without funds to hire a lawyer, the judge

would appoint or provide one for him. Defendant then wrote a statement including a repetition of his Miranda rights, specifically, the following clause: " . . . I can talk to a lawyer or anyone before saying anything, and that the judge will get me a lawyer if I am broke." (380 F.2d at p. 307.) The Tenth Circuit Court of Appeal rejected the contention that the advisement, and defendant's repetition of it, indicated that defendant had not been informed with sufficient clarity of his right to a court-appointed attorney at the time the statement was made.

In Evans v. Swenson (8th Cir. 1972) 455 F.2d 291, cert. den. 408 U.S. 929, 92 S.Ct. 2508, 33 L.Ed.2d 342, the court upheld an advisement by which a police officer informed a defendant that he had a right to a phone call, that he had a right to an attorney, and that if defendant didn't have an attorney or couldn't afford one, "I'll [the

police officer] get one for you." (455 F.2d at 295.) The court stated that appellant "was clearly advised and informed in substance that . . . if he could not afford an attorney one would be furnished for him prior to his making any statement and before continuing the interview, if he so desired." (455 F.2d at pp. 295-296.)

In United States v. Noa (9th Cir. 1971) 443 F.2d 144, the court rejected appellant's contention that the warning he was given was inadequate because it failed to explicitly inform him that he had a right to consult with an appointed attorney prior to any questioning. The court upheld a warning which informed appellant "You have the right to talk to a lawyer for advice before he asks you any questions and to have him with you during questioning. If you cannot afford a lawyer, one will be appointed for you if you wish." (443 F.2d at p. 145.)

These courts, unlike the California Court of Appeal herein, have looked to the substance of the warnings and determined that, in warnings like those given in the present case, appropriate advisement of the right to free counsel occurred.

The California Court of Appeal, by ruling respondent's confession inadmissible for noncompliance with Miranda, has infringed upon the People's right to proceed to trial with properly admissible and highly important evidence. As this Court has stated in United States v. Nixon (1974) 418 U.S. 683, 709, 94 S.Ct. 3090, 41 L.Ed.2d 1039:

> "'The twofold aim [of criminal justice] is that guilt shall not escape or innocence suffer.' Berger v. United States, 295 U.S. at 88, 79 L.Ed. 1314. We have elected to employ an adversary system of criminal justice in which the parties contest all issues before a court of law. The need to develop all relevant facts in the adversary system is both fundamental and comprehensive. The ends of criminal justice would be defeated if judgments were to be

> founded on a partial or speculative presentation of the facts. The very integrity of the judicial system and public confidence in the system depends on full disclosure of all the facts, within the framework of the rules of evidence. To ensure that justice is done, it is imperative to the function of courts that compulsory process be available for the production of evidence needed either by the prosecution or by the defense."

Furthermore, the prosecution's right to the production of all evidence at a criminal trial has constitutional dimensions. The Nixon opinion bases the prosecution's right to present all properly admissible evidence upon the right of due process. Withholding properly admissible and

> " . . . demonstrably relevant [evidence] in a criminal trial would cut deeply into the guarantee of due process of law and gravely impair the basic function of the courts. . . . [T]he constitutional need for production of relevant evidence is specific and central to the fair adjudication of a particular criminal case in the administration of justice." (United States v. Nixon, supra, 418 U.S. 683, at pp. 712-713.)

The People's due process right is

particularly clear in the instant case. Respondent's confession was both voluntary and given after a painstakingly thorough, and proper, Miranda warning. The confession constitutes important evidence of the crimes; significantly, no question exists as to respondent's culpability of the crimes.

Thus, due process and a common sense interpretation of Miranda dictate that the California Court of Appeal was in error in ruling respondent's confession inadmissible.

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We respectfully submit that a writ of certiorari should issue to review the decision of the Court of Appeal.

Respectfully submitted,

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APPENDIX A

APPENDIX -- (Opinion dated

December 5, 1980, 5 DCA)

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE
STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. RANDALL JAMES PRYSOCK, Defendant and Appellant.	5 Crim. No. 4051 (Super. Ct. No. 18655) O P I N I O N

Appeal from a judgment of the Superior Court of the County of Tulare. David L. Allen, Judge. Reversed and remanded.

Quin Denvir, State Public Defender, under appointment by the Court of Appeal, and Richard C. Fathy, Deputy State Public Defender, for Defendant and Appellant.

George Deukmejian, Attorney General, Robert H. Philibosian, Chief Assistant Attorney General, Arnold O. Overoye, Assistant Attorney General, Diana Beth Constantino and Carla J. Caruso, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant, Randall James Prysock, aged sixteen at the time of the offenses charged herein, was found guilty by jury of first degree murder of Iris Donna Erickson as charged in Count One of an amended information. The jury also returned special findings that the murder was (1) willful, deliberate and premeditated, and was personally committed by defendant during the commision [sic] of a robbery; and (2) was willful, deliberate and premeditated and personally committed by appellant involving the infliction of torture. The jury also found that the charge of using a deadly weapon in the murder was

true. (Pen. Code, §§ 187, 190.2,[1/] 12022, subd. (b).)

The jury also returned verdicts of guilty on the following charges: Count Two, robbery of Iris Donna Erickson with the use of a dangerous weapon (Pen. Code, §§ 211, 12022, subd. (b)); Count three, burglary of the residence occupied by Iris Donna Erickson and accompanied with the use of a deadly weapon (Pen. Code, §§ 459, 12022, subd. (b)); Count Four, auto theft (Veh. Code, § 10851); Count Five, escape from a youth facility (Welf. & Inst. Code, § 871); and Count Six, destroying evidence (Pen. Code, § 135). Mark Danley, defendant's coparticipant and also a juvenile, was found guilty of the same charges in a later trial, including the

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1. Defendant is accused of having committed the offenses on January 30, 1978, therefore, he is being tried under laws enacted by the Legislature in 1977. (Stats. 1977, ch. 316.)

special findings and an additional charge not relevant here.

The court sentenced defendant under Count One to state prison for life without possibility of parole. The sentences for Counts Two through Six were stayed pursuant to Penal Code section 669.

We reverse and order a new trial because of Miranda error. For the guidance of the trial court upon retrial, we also discuss whether evidence was properly admitted concerning the defendant's presence when his co-participant Mark Danley was arrested on a prior vehicle theft charge and alleged instructional error. Other issues raised by the parties but not likely to recur on retrial are not discussed. We deem it unnecessary to discuss the issue of whether there is sufficient evidence to support a jury determination of premeditation and

deliberation and the issue of the alleged Penal Code section 135 violation.

FACTS

Brad Erickson, the victim's sixteen year old son, had reported a car theft of co-participant Mark Danley some four months prior to the incidents in question. Danley subsequently made the boast that he was going "to take care of" Brad Erickson's mother, the murder victim. Defendant overheard this statement. Defendant had been (innocently) with Danley when he was arrested for this prior car theft.

The defendant and Danley escaped from a juvenile detention facility during the evening of Saturday, January 28, 1978. Danley stole a vehicle in which the boys rode about in Tulare County on Sunday. Danley collided with a tree and set the interior on fire. The next day, Monday, defendant stole a Datsun pickup. Danley then drove it around

the town of Porterville. He drove to his house to obtain clothing and food, but did not stop because his mother was at home.

Danley then drove past the victim's house several times, saying that he knew where they could get some food and clothes. The victim's car was known to Danley. It was not there since it was at a repair shop. The victim's son, Brad Erickson, had left in his pickup earlier to take some papers to a recycling center. The defendant and Danley stopped long enough to look in the garage. Danley made two separate telephone calls to an unknown number from a convenience store located near the house.

The pair then parked on a nearby street and walked to the rear of the house. Danley attempted to force entry by breaking out a window. When confronted by the victim, both boys ran to the front of the house and

forced[2/] entry through the front door.

When the victim announced that she was going to call the police, defendant hit her two or three times with a wooden dowl which he found near where he was standing in the living room. Danley then hit her with a metal fireplace poker, stabbed her in the back eight times with an ice pick to a consistent depth of 1" to 1 1/4" and eventually strangled her to death with a telephone cord.

After the murder, the boys stole a shotgun, some food, money and tapes from the house. They also stole clothes which they changed into, subsequently burning the clothes which they wore at the time of the killing. Later that day, their vehicle, full of incriminating evidence, was spotted by the police resulting in a chase and their arrest.

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2. There is conflict in the evidence as to the method of entry and whether force was used.

MIRANDA ERROR[3/]

Shortly after being taken to the police station, the defendant was given a statement of rights by a Sgt. Byrd. Defendant declined to talk. The record does not reveal the exact content of the advisement, the officer merely testified that he read a recitation of Miranda rights.

Defendant's parents were called, and they came to the station. About 20 minutes after defendant refused to talk, his mother entered the room where her son was located. She talked with him about 20 minutes. Defendant's mother exited and indicated defendant wished to discuss the events of earlier in the day.[4/] A few minutes after

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3. Miranda v. State of Arizona (1966) 384 U.S. 436.

4. The facts suggest possible Pettinghill error but none occurred. The mother came to the station house at police behest and requested permission to talk with her son.

this Sergeant Byrd re-entered the room where defendant was located; defendant's parents followed. Byrd took a taped statement from defendant which was admitted into evidence. The statement is set forth in full in the appendix attached hereto.

Defendant contends that he was not given an adequate warning tht he could have the services of a free attorney before and during the interrogation. We agree.

The issue can be presented by selecting portions of the statement and pertinent testimony given by Sergeant Byrd as to an off-tape discussion. The tape reflects the following:

> "Sgt. Byrd: You have the right to talk to a lawyer before you are questioned, have him present with you while you are being questioned, and

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Footnote 3 continued.

After twenty minutes of conversation she then advised the police that her son was ready to talk. (See People v. Pettinghill (1978) 21 Cal.3d 231.)

all during the questioning. Do you understand this?

"Randall P.: Yes.

"Sgt. Byrd: You also, being a juvenile, you have the right to have your parents present, which they are. Do you understand this?

"Randall P.: Yes.

"Sgt. Byrd: Even if they weren't here, you'd have this right. Do you understand this?

"Randall P.: Yes.

"Sgt. Byrd: You all, uh -- if -- you have the right to have a lawyer appointed to represent you at no cost to yourself. Do you understand this?

"Randall P.: Yes."

The trial transcript reveals the following regarding an off-the-record conversation that took place at Mrs. Prysock's request just after defendant was advised of his rights and prior to any questioning:

"Q [Prosecution] Okay. And what was discussed during the time the tape was off?

"A [Sgt. Byrd] Her question was if he gave a statement, could, as I recall, could she still have an attorney at a later time or would -- did this deny him the right to have an attorney at a later date.

"Q And what was your response to that?

"A That he would have an attorney when he went to Court. And that he could have one at this time if he wished one. He could terminate the statement at any time he so desired.

"Q Okay. Did anybody respond to that in the room?

"A Well, they said, as I recall, said 'Go ahead.' They just wanted to clarify that point."

On cross examination, Sgt. Byrd was questioned about a discussion after the statement was given:

"Q [Defense counsel] Did you ever mention to Mr. or Mrs. Prysock or Randy how much it would cost them to hire an attorney?

"A I think Mr. Prysock made some remarks to me that he didn't have money to hire an attorney. And I told him that the price of an

attorney that Randy qualified for the Public Defender's Office.

"And that the price of the attorney that this would be the proper people to contact, and that they had some excellent attorneys, I believe is the statement I made to him.

"Q Is this reflected in your police report?

"A No, it is not.

"Q When are you recalling that you made this remark to Mr. Prysock before or after the tape started?

"A This was after the tape.

"Q Was this completely after the statement was given?

"A Yes. And in fact I had to go eat and come back as I recall."

It is not for this court to overrule Miranda, disparage it, nor extend it. Its meaning is clear. It has stood the test of time. Law enforcement practices have adjusted to its strictures. One of its virtues is its precise requirements which are so easily met.

The United States Court of Appeals, Fifth Circuit, sitting en banc in Harryman v. Estelle (5th Cir. 1980) 616 F.2d 870, recently discussed the Miranda decision and stated:

> "The rigidity of the Miranda rules and the way in which they are to be applied was conceived of and continues to be recognized as the decision's greatest strength. E.g., Tague v. Louisiana, ____ U.S. ____, 100 S.Ct. 652, 62 L.Ed.2d 622 (1980); Miranda v. Arizona, 384 U.S. at 479, . . . See also Fare v. Michael C., 439 U.S. 1310, 1314, 99 S.Ct. 3, 5, 58 L.Ed.2d 19 (1978) Rehnquist, J., on application for stay) (calling rigidity of Miranda its 'core virtue'). The decision's rigidity has afforded police clear guidance on the acceptable manner of questioning an accused. It has allowed courts to avoid the intractable factual determinations that the former totality of the circumstances approach often entailed. When a law enforcement officer asks a question of an accused and the accused, without the benefit of Miranda's safeguards, answers, the totality of the circumstances is irrelevant. The accused's answer is simply inadmissible at trial as part of the prosecution's case in chief." (Id. at pp. 873-874.)

The language of Miranda bears repeating. (See Miranda v. State of Arizona (1966) 384 U.S. 436.) At 384 U.S. page 479 we are told that a person about to undergo custodial interrogation must be told:

" . . . that he has the right to the presence of an attorney, and that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires. . . ."

In the case at bench, the defendant was told that he had a right to talk to a lawyer before he was questioned and to have him present during the questioning. The officer then could and should have added, "and if you cannot afford an attorney one will be appointed for your prior to any questioning if you so desire". Instead, the officer diverted the conversation to a discussion of the minor's right to have his parents present. This was a needless excursion, since both parents were seated in

the room with their son. The officer then said:

> "Sgt. Byrd: You all, uh -- if -- you have the right to have a lawyer appointed to represent you at no cost to yourself. Do you understand this?
>
> " Randall P.: Yes. [sic]

Unfortunately, the minor was not given the crucial information that the services of the free attorney were available prior to the impending questioning.

The matter was obfuscated, rather than clarified, by the off-the-record discussion. The statement in reference to attorney services omitted the advice that a free lawyer would be provided prior to questioning if desired.

Since most police agencies use a standard Miranda warning card, there are not many recent cases on the subject. However, if we go back to the first year or two after the Miranda decision, when the full scope of the

decision was not universally understood, we find some.

In People v. Bolinski (1968) 260 Cal.App.2d 705, 718, 723, prior to giving a statement the defendant was told by one officer that if he was charged he would be appointed counsel. By another officer he was told that he had a right to a lawyer. The parties were then in Illinois and the second officer testified: "I advised him that the court would appoint one in Riverside County" and that a "public defender would be furnished for him by the court."

Bolinski differs from the case at bench in that there was a stronger implication that the provision of free counsel would be provided later. But it is similar to our case in that there was no statement that free counsel would be provided prior to questioning if desired.

Bolinski was followed by People v Stewart (1968) 267 Cal.App.2d 366. The Stewart court held that a warning which told the defendant " . . . that he had a right to an attorney, and he could have his attorney here; . . . [that] he had a right to have the Public Defender appointed in case he couldn't afford an attorney; that if he didn't want the Public Defender to be appointed, that he could pick an attorney and this attorney would be appointed by the Court for him," was not adequate." (Id. at p. 378, fn. 16.) The court stated at page 378:

> "It is argued that the statement that defendant might have his attorney 'here' distinguishes Bolinski and satisfies Miranda. We do not agree. The burden is on the People to show that warnings of all the constitutional rights were given, that defendant understood them, and that he thereafter voluntarily and intelligently waived those rights. Ambiguities in the warnings must be resolved against the prosecution. As recounted in the case at bench, the warning could well have been interpreted to mean no more than

that the court-appointed attorney would, at some future time, visit defendant in jail. This is not the equivalent of telling him that the interrogation would suspend until the attorney arrived."

It may be seen that Stewart closely parallels the case at bench. There the defendant was told that he could have his attorney "here", and that he had the right to have the public defender appointed. In our case defendant was told he had a right to talk to a lawyer before and during questioning and that he had a right to have a lawyer appointed to represent him at no cost. In both cases it was not stated that the free attorney could be present in the interrogation room.

VOLUNTARINESS OF CONFESSION

The finding of Miranda error obviates the need to review defendant's statement on the issue of voluntariness according to the principles enunciated in People v.

Sanchez (1969) 70 Cal.2d 562, 576, cert. dism., 394 U.S. 1025. However, we note that the trial court was told by the prosecution that the test to be used in determining the voluntariness of a confession was that of preponderance of the evidence, and the court made its ruling without stating that it was applying the correct standard of proof of beyond a reasonable doubt. (See People v. Jimenez (1978) 21 Cal.3d 595.) Perhaps the reason for the apparent error was the fact that Jimenez had been filed just four days prior to the hearing challenging the voluntariness of the confession in this case.

ADMISSION OF EVIDENCE THAT DEFENDANT WAS WITH DANLEY WHEN THE LATTER WAS ARRESTED

Over timely objection on the ground of relevancy, the prosecution was permitted to cross-examine the defendant on the fact that the latter was (innocently) with Danley when Danley was arrested for car theft. It

will be recalled that the victim's son had reported this theft to law enforcement. There was no evidence that the defendant knew this fact at the time of the arrest, but defendant admitted that he was present when Danley told a fellow Juvenile Hall resident that he was going to "take care of" Mrs. Erickson.

The question and answer tend to disprove those portions of defendant's testimoney in which he alleged he did not know of any Brad Erickson or his family and tends to disprove his statement at trial that he did not know what Danley meant when he "overheard" Danley telling another juvenile hall resident that he was going to "take care" of Brad Erickson's mother.

A trial court is vested with wide discretion in deciding relevance of evidence. (People v. Warner (1969) 270 Cal.App.2d 900, 908.) It was within the trial court's

discretion to admit the testimony.

FLIGHT INSTRUCTION

Defendant contends that the trial court prejudicially erred when it gave CALJIC No. 2.52, the standard flight instruction.[5/] He implicitly concedes that evidence of flight existed but argues that the instruction might be used by the jury to find appellant's state of mind at the time the crime was committed, which it is claimed, is contrary to People v. Anderson (1968) 70 Cal.2d 15, pages 32-33.

---

5. CALJIC 2.52 states as follows:

"The flight of a person immediately after the commission of a crime, or after he is accused of a crime that has been committed, is not sufficient in itself to establish his guilt, but is a fact which, if proved, may be considered by you in the light of all other proved facts in deciding the question of his guilt or innocence. The weight to which such circumstance is entitled is a matter for the jury to determine."

Respondent asserts that Penal Code section 1127c mandated the instruction, that the instruction did not direct the jury to consider flight as bearing on appellant's mental state, and that other instructions informed the jury as to the intent required.

Penal Code section 1127c provides:

> "In any criminal trial or proceeding where evidence of flight of a defendant is relied upon as tending to show guilt, the court shall instruct the jury substantially as follows:
>
> "The flight of a person immediately after the commission of a crime, or after he is accused of a crime that has been committed, is not sufficient in itself to establish his guilt, but is a fact which, if proved, the jury may consider in deciding his guilt or innocence. The weight to which such circumstance is entitled is a matter for the jury to determine.
>
> "No further instruction on the subject of flight need be given."

Defendant has cited no authority which suggests that the instruction was improper here. Anderson, supra, did not

involve CALJIC 2.52 or flight evidence at all. Rather, it concerned other evidence of cognizance of guilt.

In essence, appellant's argument appears to be that the instruction should have been modified to limit the effect of flight to issues other than appellant's mental state.

The trial court had no sua sponte duty to modify the instruction.

- - - - -

ORDER

The judgment is reversed as to all counts except Count 5, and the cause remanded for retrial. As to Count 5, "escape", the judgment is affirmed. None of the errors complained of or dealt with here affect that count.

ANDREEN
J.

WE CONCUR:

HOPPER
Acting P.J.

THOMPSON
J.*

* Retired Judge of the Superior Court assigned by the Chairperson of the Judicial Council.

APPENDIX

"Sgt. Byrd: . . . Today's date being January the 30th 19 and 78; The time at this time is 22:47 hours; interviewing officer is Sergeant Byrd, Tulare County Sheriff's Office. Sitting in on the interview is his mother Maxine Prysock and James Prysock. Mrs. Prysock, would you state your full name for the record please.

"Mrs. P.: Lenora Maxine Prysock.

"Sgt. Byrd: And Mr. Prysock, would you state your name please.

"Mr. P.: My name is James, Jr. Prysock.

"Sgt. Byrd: And, Randall, would you state your full name please.

"Randall P.: Randall James Prysock.

"Sgt. Byrd: Okay. Mr. Randall James Prysock, earlier today I advised you of your legal rights and at that time you advised me you did not wish to talk to me, is that correct?

"Randall P.: Yeh.

"Sgt. Byrd: And, uh, since then you have asked to talk to me, is that correct?

"Randall P.: Yeh.

"Sgt. Byrd: And, uh, during, at the first interview your folks were not present, they are now present. I want to go through your legal rights again with you and after each legal right I would like for you to answer whether you understand it or not. And it's being recorded so if I

could get you to would you set up pretty straight and remove your hand from your mouth and talk as plain as you possibly can, okay. Your legal rights, Mr. Prysock, is follows:
Number One, you have the right to remain silent. This means you don't have to talk to me at all unless you so desire. Do you understand this?
"Randall P.: Yeh.
"Sgt. Byrd: If you give up your right to remain silent, anything you say can and will be used as evidence against you in a court of law. Do you understand this?
"Randall P.: Yes.
"Sgt. Byrd: You have the right to talk to a lawyer before you are questioned, have him present with you while you are being questioned, and all during the questioning. Do you understand this?
"Randall P.: Yes.
"Sgt. Byrd: You also, being a juvenile, you have the right to have your parents present, which they are. Do you understand this?
"Randall P.: Yes.
"Sgt. Byrd: Even if they weren't here, you'd have this right. Do you understand this?
"Randall P.: Yes.
"Sgt. Byrd: You all, uh, -- if, -- you have the right to have a lawyer appointed to represent you at no cost to yourself. Do you understand this?
"Randall P.: Yes.
"Sgt. Byrd: Now, having all these legal

rights in mind, do you wish to talk to me at this time?

"Randall P.: Yes.

"Sgt. Byrd: Now, uh, Mrs. Prysock, you are indicating you want to talk to me with the tape recorder off. So I am going to shut the tape recorder off for a couple minutes, or whatever time it takes. The time at this time is 10:50 p.m. on 1/30/77. Going off the tape.

. . . . . .

Okay, Mrs. Prysock, you asked to get off the tape, we are going back on the tape and the time now is 22:55 hours, we are on 1/30/78, the time, uh, we were off the air, the record, record for approximately five minutes. During that time you asked, decided you wanted some time to think about getting, whether to hire a lawyer or not.

"Mrs. P.: 'Cause I didn't understand it.

"Sgt. Byrd: And you have decided now that you want to go ahead and you do not wish a lawyer present at this time?

"Mrs. P.: That's right.

"Sgt. Byrd: And I have not persuaded you in any way, is that correct?

"Mrs. P.: No, you have not.

"Sgt. Byrd: And, Mr. Prysock is that correct that I have done nothing to persuade you not to, to hire a lawyer or to go on with this?

"Mr. P.: That's right.

"Sgt. Byrd: Okay, everything we're doing here is strictly in accordance with Randall and yourselves, is that correct?

"Mr. P.: That is correct.

"Sgt. Byrd: Okay. Uh, all right, Randy, I can't remember where I left off, I think I asked you, uh, with your legal rights in mind, do you wish to talk to me at this time? This is with everything I told you, all your legal rights, your right to an attorney, your right, and your right to remain silent, and all these, I mean do you wish to talk to me at this time about the case?
"Randall P.: Yes.
"Sgt. Byrd: Okay, uh, uh, Randy, or it's Randall, if I might call you Randall, that all right with you?
"Randall P.: Yes.
"Sgt. Byrd: Okay. Would you in your own words just tell me what happened?
"Randall P.: Well, sir, it was about, this morning about 7:30 or 8:00, Mark knew where this car was parked at, the, the Datsun. And, uh, he knew it was by the store 'cause he said they usually leave the keys in it. So he was the one that wanted to take it.
"Sgt. Byrd: Okay. What kind of a car was this?
"Randall P.: A Datsun.
"Sgt. Byrd: What color was it?
"Randall P.: White.
"Sgt. Byrd: Okay. And did you take it?
"Randall P.: Yeh, we taken it.
"Sgt. Byrd: Uh, okay, who, you say we, who are you talking about when you say we?
"Randall P.: Mark taken it.
"Sgt. Byrd: Mark, what's his last name?
"Randall P.: Danley.
"Sgt. Byrd: And who drove the car?
"Randall P.: Mark did.

"Sgt. Byrd: Okay. And where did you go?
"Randall P.: Well, we tooken it, and we came to Porterville this morning.
"Sgt. Byrd: Where did you go in Porterville?
"Randall P.: All over, we just went . . .
"Sgt. Byrd: Okay. Did you ever end up at any certain place?
"Randall P.: No.
"Sgt. Byrd: Did you ever stop anywhere?
"Randall P.: No.
"Sgt. Byrd: At no houses, no nothing?
"Randall P.: No. We didn't stop anyplace.
"Sgt. Byrd: Well, did sometime today, did some . . .
"Randall P.: Well . . .
"Sgt. Byrd: Something happen?
"Randall P.: We stopped at that red house.
"Sgt. Byrd: At a red house?
"Randall P.: Yeh.
"Sgt. Byrd: Is it some other color than red?
"Randall P.: As far as I can remember it's red.
"Sgt. Byrd: What color is the top?
"Randall P.: I can't, it's either white.
"Sgt. Byrd: White top? Okay. Uh, you know what street it's on?
"Randall P.: No.
"Sgt. Byrd: Okay, did you park right in front of the house, or where did you park?
"Randall P.: We parked about a block from it.
"Sgt. Byrd: And, uh . . .
"Randall P.: On a different road.
"Sgt. Byrd: Yeh. Uh, did you walk down to the house then?
"Randall P.: Yes.
"Sgt. Byrd: Okay. How were you dressed

at the time you walked down to the house?

"Randall P.: In our, in our, uh, camp clothes.

"Sgt. Byrd: Okay. And when you got to the house, what did you do?

"Randall P.: Well, Mark wanted to take everything and, Mark, and that lady answered the door. Well, Mark went around to the window and broke out that window and that lady come to the door. And Mark kicked the door open and went in there, pushed her down.

"Sgt. Byrd: Pushed her down?

"Randall P.: Yeh.

"Sgt. Byrd: And then what happened?

"Randall P.: And then Mark [inaudible], and I hit her once. And Mark . . .

"Sgt. Byrd: What did you hit her with?

"Randall P.: A little, a stick.

"Sgt. Byrd: What kind of a stick?

"Randall P.: Looked like a broom handle.

"Sgt. Byrd: Okay. Where did you hit her at?

"Randall P.: In the head.

"Sgt. Byrd: In the back of the head or the front of the head?

"Randall P.: I can't remember.

"Sgt. Byrd: You just hit her with a stick?

"Randall P.: Yeh.

"Sgt. Byrd: Then what happened?

"Randall P.: Then Mark picked up this thing that was setting on the fireplace and he hit her in the head a bunch of times.

"Sgt. Byrd: What kind of a thing was it?

"Randall P.: I don't know, it's, it, I don't, it's what you use for a fireplace to clean them out I guess or

something.
"Sgt. Byrd: Kind of a shovel-like deal?
"Randall P.: Yeh.
"Sgt. Byrd: Okay. Go ahead.
"Randall P.: Then he hit her in the head a bunch of times, then, you know, that was it, then she started screaming and stuff. And Mark, that's when Mark stabbed her.
"Sgt. Byrd: What did he stab her with?
"Randall P.: Ice pick.
"Sgt. Byrd: Where did he get the ice pick at?
"Randall P.: I don't know.
"Sgt. Byrd: Okay. Then what happened?
"Randall P.: Then, that's all I know, Mark took, Mark went to the house and took what he wanted.
"Sgt. Byrd: What did he take?
"Randall P.: He took a gun, money, uh, clothes, that's about all I can remember. And we went over and got the pickup, Mark put all that crap in and Mark drove off.
"Sgt. Byrd: Okay. You were telling me earlier, or, uh, something about you met a guy in, in camp. And that's just before I walked in, this was just something you blurted out to me, uh, as we was coming in here. What, what was this, I don't recall exactly what it was. Something about somebody in camp give you an idea to do it or something. What was this?
"Randall P.: Oh, I said Mark told Hipp that his plans, what he was going to do.
"Sgt. Byrd: Okay, now, who is Hipp?
"Randall P.: Roy Hipp.
"Sgt. Byrd: And where'd you meet him at?

"Randall P.: At Juvenile Hall.
"Sgt. Byrd: And how long ago was this?
"Randall P.: About three, two or three weeks.
"Sgt. Byrd: And what did Mark tell this guy that he was going to do?
"Randall P.: He told him what all he was going to do was rob, and what he was going to do to Brad Erickson's mom.
"Sgt. Byrd: What'd he say he was going to do to her?
"Randall P.: Kill her.
"Sgt. Byrd: Well, why, how, why did he want to kill her?
"Randall P.: I don't know. He never did tell me.
"Sgt. Byrd: Are these things that you're telling me the truth?
"Randall P.: Yes.
"Sgt. Byrd: Okay. Uh. Where did you go after you left the residence where the old lady was beaten up and stabbed?
"Randall P.: Mark, well Mark was driving off and we, I don't know, we went a bunch of back roads, we went to a whole bunch of back roads. I don't know where they were.
"Sgt. Byrd: Well, did you do something with clothes, jail clothing you was wearing?
"Randall P.: Yeh.
"Sgt. Byrd: What was that?
"Sgt. Byrd: Burn 'em.
"Sgt. Byrd: You burn 'em or throw 'em out?
"Randall P.: We burned 'em.
"Sgt. Byrd: What about the tennis shoes you was wearing?
"Randall P.: We burned 'em.
"Sgt. Byrd: You burned everything?

"Randall P.: Yeh.
"Sgt. Byrd: You sure of this?
"Randall P.: Yes.
"Sgt. Byrd: You didn't just throw 'em out in an orange grove?
"Randall P.: No, we burned 'em.
"Sgt. Byrd: Okay. Mr. and Mrs. Prysock, do you have anything you'd like to ask?
"Mrs. P.: Yes, I would. I'd like to know; I wish to would like to ask Randy when he started drinking. To me he appears he has been drinking heavily. I know my child.
"Sgt. Byrd: Okay. How much have you had to drink?
"Randall P.: Well, we started this morning and we had a case of beer.
"Sgt. Byrd: How do you feel right now?
"Mrs. P.: I'd like a blood sample taken of him also.
"Sgt. Byrd: Yeh, there has been a blood sample taken ma'am. How many, how do you feel now?
"Randall P.: Uh, I feel . . .
"Mrs. P.: He can't remember . . .
"Randall P.: Dizzy . . .
"Mrs. P.: [inaudible] . . . bringing that in.
"Sgt. Byrd: Huh?
Randall P.: I feel dizzy. I don't know.
"Sgt. Byrd: Do you know what you're telling me now?
"Randall P.: Yes.
"Sgt. Byrd: Are you well aware of what you're saying?
"Randall P.: Yes.
"Sgt. Byrd: And there's not a doubt in your mind that what you're telling us is exactly what happened?
"Randall P.: That's what happened; what

I'm telling you.

"Sgt. Byrd: Do you have any questions, other questions?

"Mr. P.: No.

"Sgt. Byrd: Okay. This will conclude the interview then. Today's date still being January the 30th, 1978, the time at this time is 11:02 p.m. Same people present, Mr. Randall James Prysock; myself, Detective Sergeant Byrd; Mr. Prysock's father, James Prysock; and his mother, now I forgot your . . .

"Mrs. P.: Maxine . . .

"Sgt. Byrd: And your first name?

"Mrs. P.: Lenora Maxine.

"Sgt. Byrd: Lenora Maxine Prysock. Okay, Randall, thank you very much for your cooperation."

APPENDIX B

IN THE
COURT OF APPEAL OF THE STATE OF CALIFORNIA
IN AND FOR THE
FIFTH APPELLATE DISTRICT

Court of Appeal
Fifth Appellate District
F I L E D
JAN 2, 1981
KEVIN A. SWANSON, Clerk
By_____
Deputy

THE PEOPLE,
Plaintiff and Respondent,
vs.
RANDALL JAMES PRYSOCK,
Defendant and Appellant.

5 Crim. No. 4051

O R D E R

BY THE COURT:

Permission for Respondent to file a Petition for Rehearing is denied. The time for filing under Rule 27 has passed. If permission to file were granted, there would be no time within which appellant could respond before the decision in this court becomes final.

Dated: Jan. 2, 1981

Hopper Acting P.J.

I CONCUR:

Thompson
J.*

*Retired Judge of the Superior Court assigned by the Chairperson of the Judicial Council.

APPENDIX C

IN THE
COURT OF APPEAL OF THE STATE OF CALIFORNIA
IN AND FOR THE
FIFTH APPELLATE DISTRICT

Court of Appeal
Fifth Appellate District
F I L E D
Jan 2, 1981
KEVIN A. SWANSON, Clerk
By_____
Deputy

THE PEOPLE,
Plaintiff and Respondent,
vs.
RANDALL JAMES PRYSOCK,
Defendant and Appellant.

5 Crim. No. 4051

O R D E R

BY THE COURT:

Appellant's Petition for Rehearing is denied.

(Andreen, J., is of the opinion that the petition should be granted.)

Dated: Jan. 2, 1981

Hopper Acting P.J.

I CONCUR:

Thompson J.*

*Retired Judge of the Superior Court assigned by the Chairperson of the Judicial Council.

APPENDIX D

ORDER DENYING HEARING
AFTER JUDGMENT BY THE COURT OF APPEAL
5th District, Division ____, Crim. No. 4051

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

IN BANK

SUPREME COURT
F I L E D
MAR-5 1981
LAURENCE P. GILL, Clerk
Dell
Deputy

PEOPLE

v.

RANDALL JAMES PRYSOCK

Rattigan, J., sitting under assignment by the Chairperson of the Judicial Council

Petitions for hearing DENIED.

Mosk, J., and Richardson, J., are of the opinion that the petitions should be granted.

Bird
Chief Justice

I, LAURENCE P. GILL, Clerk of the Supreme Court of the State of California, hereby certify that the preceding is a true copy of an order of this Court, as shown by the records of my office.

Witness my hand and the seal of the Court this 17th day of March A.D. 1981

By J. Kavanaugh
Deputy Clerk

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MAY 11 1981
OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1980

No. 80-1846

THE STATE OF CALIFORNIA, Petitioner,

v.

RANDALL JAMES PRYSOCK, Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FOR THE FIFTH APPELLATE DISTRICT

RESPONDENT'S BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

QUIN DENVIR
State Public Defender

455 Capitol Mall, Suite 335
Sacramento, California 95814
Telephone: (916) 322-7520

Attorney for Respondent

COPY

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1980

No. 80-

THE STATE OF CALIFORNIA,

Petitioner,

vs.

RANDALL JAMES PRYSOCK,

Respondent.

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

Respondent, RANDALL JAMES PRYSOCK, by and through his counsel, asks leave to file the attached Respondent's Brief in Opposition to the Petition for Writ of Certiorari without prepayment of costs and to proceed in forma pauperis pursuant to Rule 53.

The affidavit of respondent in support of this motion is attached hereto.

QUIN DENVIR
State Public Defender

Attorney for Respondent

COPY

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1980

No. 80-

PEOPLE OF THE STATE OF CALIFORNIA, Petitioner

v.

RANDALL JAMES PRYSOCK, Respondent

DECLARATION

I, RANDALL JAMES PRYSOCK, being first duly sworn according to law, declare and say, in support of my motion for leave to proceed without being required to prepay costs or fees:

1. I am the respondent in the above-entitled case.

2. I was permitted to proceed in forma pauperis in the trial court and in the California Court of Appeal. Because of my poverty I am unable to pay the costs of said case.

3. I am unable to give security for the same.

4. I believe that I am entitled to the redress I seek in said case.

5. The nature of said case is briefly stated as follows:

I was convicted of murder with special circumstances and several other charges in the Tulare County, California Superior Court. All but one of these convictions were reversed by the Court of Appeal of California for the Fifth Appellate District. The present proceeding was commenced by the People of the State of California in a Petition for a Writ of Certiorari to the Court of Appeal of California for the Fifth Appellate District.

Dated: May 7, 1981.

Randall Prysock 5-7-81

RANDALL JAMES PRYSOCK

COPY

Office-Supreme Court, U.S.
FILED
MAY 11 1981
ALEXANDER L. STEVAS,
CLERK

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1980

No. 80-

80-1846

THE STATE OF CALIFORNIA, Petitioner,

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ON PETITION FOR A WRIT OF CERTIORARI TO
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RESPONDENT'S BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

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Attorney for Respondent

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1980

No. 80-

STATE OF CALIFORNIA,	)
Petitioner,	)
v.	)
RANDALL JAMES PRYSOCK,	)
Respondent.	)

ON PETITION FOR A WRIT OF CERTIORARI TO
THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FOR THE FIFTH APPELLATE DISTRICT

RESPONDENT'S BRIEF IN OPPOSITION TO
THE PETITION FOR WRIT OF CERTIORARI

Respondent, Randall James Prysock, respectfully requests that this Court deny the Petition for Writ of Certiorari, seeking review of the California Court of Appeal's decision in this case. In its unanimous opinion filed December 5, 1980, the California Court of Appeal reversed respondent's conviction as to five of the six counts. The grounds were that respondent was not adequately advised of his rights under Miranda v. Arizona (1966) 384 U.S. 436, specifically, that "he was not given an adequate warning that he could have the services of a free attorney before and during the interrogation."[1/]

In so doing, the Court of Appeal found it unnecessary to reach additional claims raised by respondent. First, respondent had contended that, assuming arguendo that the advisement of

1. Petition for Writ of Certiorari (hereinafter "Pet."), Appendix A (hereinafter "Opin."), p. 9.

Miranda rights was facially sufficient, the prosecution had failed to carry its "heavy burden" (Miranda, 384 U.S. at 475) of showing that respondent had "knowingly and intelligently" (Miranda, 384 U.S. at 475) waived those rights, since there was uncontradicted testimony by Mrs. Prysock, Mr. Prysock and Randall that they did not understand or realize that, if they could not afford a lawyer, Randall had the right to have one provided by the court at no cost prior to any questioning.[2/] Second, respondent had argued that there was insufficient evidence under Jackson v. Virginia (1979) 443 U.S. 307 to support the finding of the truth of the special circumstances allegations, which finding was the basis for respondent's sentence of life imprisonment without the possibility of parole.[3/]

On April 2, 1981, Justice Rehnquist issued a temporary stay of the Court of Appeal's order, and on April 24, 1981, he continued the stay pending the Court's disposition of the petition for writ of certiorari.

STATEMENT OF FACTS

Petitioner's recounting of the facts is generally accurate, with the following additional points:

1. Petitioner's description of the murder (Pet., p. 6) fails to differentiate between the respective roles of respondent and his codefendant, Mark Danley.[4/] In this regard, the Court

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2. This uncontroverted evidence belies petitioner's claim that "[t]here is no reason to suppose appellant believed it [the warning regarding a free attorney] referred to the right to an attorney at some later time." (Pet., p. 17.)

3. Thus, contrary to petitioner's statement that "no question exists as to respondent's culpability of the crimes" (Pet., p. 23), there was considerable dispute as to what culpability there was.

4. Danley was tried separately after respondent's conviction. In spite of his attorney's advice not to testify, because "he wasn't gaining anything by it, [h]e was only putting his life in danger," respondent testified for the prosecution at Danley's trial. Danley was convicted and sentenced to life imprisonment without parole, the same sentence received by reaponsent.'

of Appeal (Opin., p. 7) found the evidence to show that,

> "When the victim announced that she was going to call the police, defendant hit her two or three times with a wooden dowel which he found near where he was standing in the livingroom. Danley then hit her with a metal fireplace poker, stabbed her in the back eight times with an ice pick to a consistent depth of 1" to 1'1/4" and eventually strangled her to death with a telephone cord."

Indeed, the prosecuting attorney himself, noting that a polygraph test had confirmed the fact that the murderous assault had been committed by Danley, stated that Randall "did not know who the Erickson family was, or the reasons why they were going over to the house on the day of the murder," that "Mr. Randall Prysock was the follower in almost every sense of the word," and that "if Mr. Prysock hadn't of been present . . . the murder still would have occurred."

2. Petitioner (Pet., p. 7) states that upon his arrival at the sheriff's substation "respondent Prysock was advised of his Miranda rights by Sergeant Byrd." (See also Pet., p. 16.) As the Court of Appeal opinion points out (Opin., p. 8), however, "[t]he record does not reveal the exact content of the advisement." Accordingly, at no time has petitioner claimed that the requirements of Miranda were fulfilled at this initial encounter between respondent and Sergeant Byrd.

3. Petiitoner (Pet., p. 9) summarizes part of an off-tape conversation between Sergeant Byrd and the Prysocks.[5/] In addition to the part summarized by petitioner, which did not involve the availability of a court-appointed lawyer, there was the following testimony regarding that subject:

> "Q [Defense counsel] Did you ever mention to Mr. or Mrs. Prysock or Randy how much it would cost them to hire an attorney?
>
> "A I think Mr. Prysock made some remarks to me that he didn't have money to hire an attorney. And I told him that the price of an attorney

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5. The actual testimony regarding this conversation is quoted in the Court of Appeal opinion at pp. 11-12.

that Randy qualified for the Public Defender's Office.

> "And that the price of the attorney that this would be the proper people to contact, and that they had some excellent attorneys, I believe is the statement I made to him." (Opin., pp. 11-12.)

Putting aside the inherent ambiguity of these remarks, telling the Prysocks at 8:30 at night (RT 227, 233-34) to contact the Public Defender's office does not make clear that Randall had a right to a court-appointed lawyer to be present at the jail prior to any questioning; if anything, it suggests that there was no right to the immediate presence of a court-appointed lawyer.

Perhaps the best appraisal of the effect of the off-tape conversation is the Court of Appeal's finding (Opin., p. 15) that "the matter was obfuscated, rather than clarified, by the off-the-record discussion."

REASONS WHY THE PETITION FOR WRIT OF CERTIORARI SHOULD BE DENIED

Petitioner asks that this Court exercise its jurisdiction under 28 U.S.C. section 1257(3) on the basis that the present case presents an important federal question. However, it is well settled that where the state court decision is based on a state law ground which is independently sufficient to uphold the decision, a grant of certiorari is unwarranted, regardless of any federal question presented. (See, e.g., Jankovich v. Toll Road Comm'n, 379 U.S. 487, 489 (1964); Fox Film Corp. v. Muller, 296 U.S. 207, 210 (1935). The rationale for refusing to review a decision based on an independent state ground, even when there is serious question as to the correctness of an alternate ruling on a federal question, was set forth in Herb v. Pitcaron, 324 U.S. 117, 125-26(1945):

> "Our only power over the state judgments is to correct them to the extent that they incorrectly adjudge federal rights. And our power is to correct wrong judgments,

> not to revise opinions. We are not permitted to render an advisory opinion, and if the same judgment would be rendered by the state court after we corrected its views of Federal laws, our review could amount to nothing more than an advisory opinion."

We will show below that, regardless of any federal question presented, the decision of the Court of Appeal herein was based upon its binding construction of California law and that, since there is an adequate and independent state ground for the decision, the petition for writ of certiorari should be denied.

First, the California Supreme Court has made clear that the doctrine of Miranda v. Arizona, supra, has been incorporated as "an intrinsic part of the law of this state." (People v. Pettingill (1978) 21 Cal.3d 231, 237.) Moreover, the Miranda doctrine, as incorporated in California state law, is not limited to this Court's holdings regarding Miranda as federal law. Compare People v. Pettingill, supra, with Michigan v. Mosley (1975) 423 U.S. 96; compare People v. Disbrow (1976) 16 Cal.3d 101 with Harris v. New York (1971) 401 U.S. 222.

Both "the relevant language of Miranda" and "the holdings of its 'California progeny' which have applied that language" are firmly grounded in state law. See People v. Pettingill, supra, 21 Cal.3d at 237. Significantly, the Court of Appeal based its decision herein primarily on two of these California progeny of Miranda: People v. Bolinski (1968) 260 Cal.App.2d 705 and People v. Stewart (1968) 267 Cal.App.2d 256. See Opin., pp. 15-18.

Moreover, the California Supreme Court decisions incorporating Miranda into state law have repeatedly lauded that decision for creating "a single, uncomplicated universally applicable test" (People v. Disbrow, supra, 16 Cal.3d at 111) which promoted "stability and predictability of the law on this important topic." (People v. Pettingill, supra, 21 Cal.3d at 250.) It is precisely this virtue of Miranda which is at the

core of decision below, which only implements Miranda according to its terms.

In short, it is clear that the decision of the Court of Appeal herein was based on an independent and adequate state ground. Thus, regardless of any federal question presented, the petition for a writ of certiorari should be denied.

Furthermore, petitioner has advanced no substantial reason for this Court to grant certiorari review of the decision herein. First, the decision turns solely on an issue regarding the application of Miranda v. Arizona, supra, and, as petitioner conceded in its application for stay of execution and enforcement of judgment (p. 5), "the issue of proper application of Miranda is not new or novel." Indeed, Miranda issues have specifically been noted to be unlikely candidates for certiorari:

> "This Court is tendered many opportunities by unsuccessful prosecutors and unsuccessful defendants to review rulings predicted on Miranda and related cases, and, as with many issues that recur in petitions before this Court, we decline most such tenders." (Fare v. Michael C. (1978) 439 U.S. 1310, 1314; Rehnquist, J., in chambers.)

Second, the Court of Appeal's decision herein presents no novel legal question or departure from settled law, even in the Miranda area. Rather, the Miranda decision itself makes clear that one of the mandatory warnings which msut be given a suspect is that "if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires" (384 U.S. at 479; emphasis added.)[6/] The Court explained the importance of this warning:

> "The warning of a right to counsel would be hollow if not couched in terms that would convey to the

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6. See also 384 U.S. at 474. In Rhode Island v. Innis (1980) 446 U.S. 291, 297, the Court recently reiterated the "now familiar Miranda warnings--namely, that the defendant be informed 'that he has the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney, one will be appointed for him prior to any questioning if he so desires.'" (Emphasis added.)

> indigent--the person most often subjected to interrogation--the knowledge that he too has a right to have counsel present." (384 U.S. at 473; emphasis added.)

Miranda similarly makes clear that there must be an "effective and express explanation" of the rights (384 U.S. at 473); the suspect "must be adequately and effectively apprised of his rights" (384 U.S. at 476); and the advisement of rights must be "in clear and unequivocal terms" (384 U.S. at 467-468). The Court of Appeal decision below merely gives effect to this express language of the Miranda decision.

Petitioner's claim that this case involves "substantial questions of a recurring nature" (Pet., p. 11) is unfounded. Shortly after the Miranda decision came down, when the full scope of the decision may not have been universally understood, the California Court of Appeal decided two cases laying down the rule that a suspect must be expressly advised not only of his right to a court-appointed attorney but also that he has a right to see that attorney prior to any questioning. (See People v. Bolinski (1968) 260 Cal.App.2d 705; People v. Stewart (1968) 267 Cal.App.2d 366.) Those early decisions put the matter to rest, and, as the Court of Appeal pointed out (Opin., p. 15), "there are not many recent cases on the subject." The police were early on provided a clear-cut rule; they have had no difficulty in complying with it, usually by using a standard Miranda warnings card. See, e.g., People v. Pettingill, supra, 21 Cal.3d at 235 n. 2; People v. Owens (1980) 106 Cal.App.3d 23, 26. In California at least, there is no recurring problem warranting certiorari revew.

Moreover, the decision below is not one which attempts "to extend Miranda or to extend in any way its strictures on law enforcement agencies." (Fare v. Michael C., supra, 439 U.S. at 1314.) Rather, it only implements "the express terms

and logic of the original opinion" (Id., 439 U.S. at 1315), thus preserving the "core virtue of Miranda." (Id., 439 U.S. at 1314.) See also Harryman v. Estelle (5th Cir. 1980) 616 F.2d 870, 873-74 (en banc).

It must be remembered that the purpose of Miranda was to establish "prophylactic rules" (North Carolina v. Butler (1979) 441 U.S. 369, 374) "to vest a suspect in custody with an added measure of protection against coercive police practices" (Rhode Island v. Innis, supra, 446 U.S. at 301). It is true that "[w]e cannot, in the nature of things, always lay down 'bright line' rules. . . ." Rosales-Lopez v. United States (1981) ___U.S. ___ (Rehnquist, J., conc). For example, on the question of what constitutes a waiver of Miranda rights, the Court has been forced to resort to a "totality of the circumstances" approach.[7] See, e.g., North Carolina v. Butler, supra; Fare v. Michael C. (1979) 442 U.S. 707, 724-25. On the other hand, there are areas which lend themselves to clear-cut rules, and the question of what constitutes an adequate advisement of rights under Miranda is one. Miranda itself set forth the language to be used, and it is only necessary, as the Court of Appeal did here, to strictly enforce that decision according to its terms.

A rule of this nature has several benefits. First, it increases the likelihood that the suspect in police custody will, in fact, understand the crucial point that "he is entitled to a government-furnished counsel here and now," not "somewhere down the line." (Lathers v. United States, (5th Cir. 1968) 296 F.2d 524, 535.) Anything less than required here will only increase the disappointingly large percentage of suspects who do not at

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7. Petitioner would have the Court fall back to a totality of the circumstances approach to the content of the Miranda warnings themselves. (Pet., p. 15.)

present comprehend their rights under Miranda. See Grisso, Juveniles' Capacities to Waive Miranda Rights: An Empirical Analysis, 68 Cal.L.Rev. 1134 (1980).[8] Second, such a rule has "the virtue of informing police and prosecutors with specificity as to what they may do in conducting custodial interrogation, and of informing courts under what circumstances statements obtained during such interrogation are not admissible." (Fare v. Michael C., supra, 442 U.S. at 718.) In short, the rule applied herein engenders a "gain in specificity, which benefits the accused and the State alike." (Fare v. Michael C., supra, 442 U.S. at 718.)

Moreover, the decision below is not at odds with the federal cases quoted and cited by petitioner. (Pet., pp. 13-15, 18-20.) Preliminarily, it should be noted that in four of the cases cited, the advisement and questioning took place before the Court issued its opinion in Miranda v. Arizona on June 13, 1966, and Miranda was applicable only because the trial began after Miranda had been decided. See Johnson v. New Jersey (1966) 384 U.S. 719, 720.[9] Moreover, another case, Tucker v. United States

8. Grisso's empirical study showed that 55.3% of juveniles and 23.1% of adults tested did not adequately understand at least one of the four Miranda warnings. (Id., at 1153-54.) Significantly, "[t]he most frequently misunderstood Miranda warning for both samples was the statement that a suspect has the right to consult an attorney before interrogation and to have an attorney present during interrogation." (Id., at 1154.)

9. The interrogation in Coyote v. United States (10th Cir. 1967) 380 F.2d 305 occurred on April 20, 1966 (380 F.2d at 307). The interrogation in United States v. Vanterpool (2nd Cir. 1968) 394 F.2d 697 took place on March 1, 1966. (394 F.2d at 699; Waterman, J., dis.) The interrogation in Camacho v. United States (9th Cir. 1969) 407 F.2d 39 occurred on October 15, 1965 (407 F.2d at 40). Although the opinion in Evans v. Swenson (8th Cir. 1972) 455 F.2d 291 places the questioning in that case in 1968, it apparently took place on May 15, 1966 (455 F.2d at 293-94), since the defendant was tried in October 1966 (Id. at 294) and sentenced on January 20, 1967 (Id. at 292.)

(8th Cir. 1967) 375 F.2d 363, is readily distinguished from the present case because there the issues were whether the defendant had unequivocally articulated a waiver of his right against self-incrimination and whether a full readvisement of Miranda rights was necessary before each and every interrogation (375 F.2d at 366)[10], the defendant having "tacitly" conceded on appeal (Id. at 365) the issue in the present case, whether the warning given at the outset of the interrogation complied with Miranda.[11]

Most significantly, in all the cited cases not only was the language of advisement of rights different than in the instant case, but also "the reference to the right to appointed counsel immediately followed the reference to the right to consult with an attorney before and during questioning" (United States v. Noa (9th Cir. 1971) 443 F.2d 144; emphasis added). It was this temporal continguity which led the court to conclude that the advisement "conveyed the substance of a warning of the right to consult with appointed counsel prior to and during questioning."

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10. Similarly, the discussion of the adequacy of the advisement in Camecho v. United States, supra, 407 F.2d at 42 and n. 2 is more dicta, the Court expressly stating that its conclusion in this regard "does not directly affect the result herein." (Id.)

11. Furthermore, in Tucker the court was able to conclude that the defendant had been advised of his Miranda rights "in language which he manifestly understood" (Id. at 369), because there was evidence that on three separate occasions the defendant had explicitly declined the services of counsel. (Id. at 368.) There is no comparable evidence in the instant case. In fact, all the evidence points to the opposite conclusion, i.e., that Randall was not advised in language that he "manifestly understood," since there was uncontradicted testimony by Randall that he did not understand that if he could not afford a lawyer, he had the right to have one provided by the court at no cost prior to questioning. (See RT 319.) This evidence was corroborated by the uncontroverted testimony of Randall's mother and father. (See RT 287, 305.)

Indeed, Randall's testimony in this regard also distinguishes the present case from Coyote v. United States, supra, where the defendant took the stand but did not "subjectively deny that he understood the precautionary warning and advice with respect to the assistance of counsel." (380 F.2d at 308.)

(Id. at 146.) See also Evans v. Swenson, supra, 455 F.2d at 296.In contrast, in the present case, after advising Randall of his right to the presence of a lawyer prior to and during questioning, Sergeant Byrd "diverted the conversation to a discussion of the minor's right to have his parents present" (Opin. p. 14), before mentioning the right to have an attorney appointed at no cost. This "needless excursion," as the Court of Appeal termed it (Id.), rendered it unlikely that Randall would understand that he had a right to the appointed attorney prior to any questioning, absent an express advisement to that effect.

Not only is the result below not inconsistent with the federal precedent cited by petitioner, but it is fully in accord with Lathers v. United States (5th Cir. 1968) 398 F.2d 524. There the Court held that a warning that "if he was unable to hire an attorney the Commissioner or the Court would appoint one for him" was inadequate because

> "The Miranda warning must effectively convey to the accused that he is entitled to a government-furnished counsel here and now. If the wards are subject to the construction that such counsel will be available only in the future, Miranda has not been obeyed." (396 F.2d at 535.)

Judge Goldberg explained that "the offer of counsel must be clarion and firm, not one of mere impressionism" and that with "the burden fall[ing] squarely on the government's shoulders to prove an offer without equivocation or ambivalence," the issue is whether the words are "so clear that they distill all doubt." (Id.)

Finally, the opinion below, which was ordered not to be published in the official reports, has no precedential value. See Rule 977, California Rules of Court (an unpublished opinion may not be cited by a court or party in any other action or proceeding, with very limited exceptions). Thus, rather than a state supreme court decision which will have a

wide effect on state law enforcement efforts (e.g. Fare v. Michael C., supra, 439 U.S. at 1312), this state court of appeal decision will have no effect outside of the particular case and thus is "simply a run of the mine case in which an appellate court [has] reached an opposite conclusion from a trial court in a unitary judicial system." (Sumner v. Mata (1981) ___ U.S. ___, 66 L.Ed.2d 722, 728.) Indeed, the main thrust of the petition is that "the California Court of Appeal has erroneously concluded. . .," that "the California Court of Apepal was in error." (Pet., pp. 11, 23.) Thus, the case is merely one of thousands presented to the Court each year seeking review of the merits of an individual decision, yet "[o]bviously this Court cannot review all decisions of other courts which hold that the prosecution has or has not carried its burden of showing that a defendant waived his 'Miranda' rights." California v. Braeseke (1980) 444 U.S. 1309, 1310 (Rehnquist, J., in chambers).

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CONCLUSION

For the foregoing reasons, respondent urges that the petition for a writ of certiorari herein be denied.

DATED: May 8, 1981.

Respectfully submitted,

QUIN DENVIR
State Public Defender

Attorney for Respondent

UNITED STATES SUPREME COURT

October Term, 1980

No. 80-

THE STATE OF CALIFORNIA,	
Petitioner,	
vs.	
RANDALL JAMES PRYSOCK,	
Respondent.	

CERTIFICATE OF SERVICE BY MAIL

QUIN DENVIR, a member of the Bar of the Supreme Court of the United States, states:

That his business address is 455 Capitol Mall, Suite 335 in the City and County of Sacramento, State of California; that on May 8, 1981 he served a true copy of the attached Respondent's Brief in Opposition to the Petition for Writ of Certiorari, the attached Motion for Leave to Proceed in Forma Pauperis, and the attached Declaration of RANDALL JAMES PRYSOCK, on each of the following, by placing same in envelopes addressed respectively as follows:

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Said envelopes were then sealed and deposited in the United States mail at Sacramento, California with the postage thereon fully prepaid.

Quin Denvir

QUIN DENVIR